D.T.E. 02-45 February 19, 2003

Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts.

APPEARANCES: James R.J. Scheltema
Director, Regulatory Affairs
Global NAPs, Inc.
5042 Durham Road West
Columbia, MD 21044-1445
-and-
William J. Rooney, Jr.
Vice President and General Counsel
Global NAPs, Inc.
89 Access Road
Norwood, MA 02062
-and-
Christopher W. Savage
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006
Petitioner

Bruce P. Beausejour
Keefe B. Clemons
Verizon New England, Inc. d/b/a Verizon-Massachusetts
185 Franklin Street, Room 1403
Boston, MA 02107
-and-
Kimberly Newman
O'Melveny & Myers LLP
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004-1109

-and-

Thomas C. Singher
Citigroup Center
O'Melveny & Myers, LLP
153 E. 53rd St., 54th Floor
New York, NY 10023

Respondent

ORDER ON VERIZON NEW ENGLAND, INC.
d/b/a VERIZON MASSACHUSETTS' MOTION FOR APPROVAL OF
FINAL ARBITRATION AGREEMENT OR,
IN THE ALTERNATIVE, FOR CLARIFICATION

I. INTRODUCTION

Pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"),[1] the Department of Telecommunications and Energy ("Department") issued on December 12, 2002 its Arbitration Order ("Arbitration Order") making findings necessary to finalize an interconnection agreement between Global NAPs, Inc. ("GNAPs") and Verizon New England, Inc. d/b/a Verizon-Massachusetts ("Verizon") (collectively, "Parties"). In its Arbitration Order, at 77, the Department directed the Parties to incorporate its findings into a final interconnection agreement "setting forth both the negotiated terms and arbitrated terms and conditions, to be filed with the Department pursuant to § 252(e)(1) of the Act, within 21 days," or by January 2, 2003. On December 19, 2002, the Parties jointly moved the Department to extend the compliance filing deadline to January 17, 2003. The Department granted the Parties' extension request on December 23, 2002.

On January 16, 2003, GNAPs informed the Department that, pursuant to § 251(i) of the Act,[2] it intended to opt-into another contract, namely to adopt the terms of the contract between

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[1] Section 252(b) of the Act permits a carrier to petition a state commission to arbitrate any issues left unresolved after voluntary negotiations between the carriers have occurred. 47 U.S.C. § 252(b)(1).

[2] Section 252(i) of the Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement

(continued…)

Verizon and Sprint Communications Company, L.P ("Sprint Agreement"). On January 17, 2003, Verizon filed its Motion for Approval of Final Arbitration Agreement or, in the Alternative, For Clarification ("Motion"). Attached as Exhibit A to its Motion, Verizon provides the Department with, and seeks approval of, contract language that it alleges conforms to the Arbitration Order. On January 23, 2003, GNAPs filed its opposition to Verizon's Motion ("Opposition").

II. POSITIONS OF THE PARTIES

A. VERIZON

Verizon contends that GNAPs first informed Verizon that it intended to adopt the Sprint Agreement, rather than finalize the contract language in accordance with the Arbitration Order, on or about January 8, 2003 (Motion at 3-4). Verizon states that it informed GNAPs that such adoption was inappropriate, and forwarded to GNAPs contract language that, according to Verizon, conforms to the Arbitration Order (id. at 4).

Verizon maintains that, despite its request to do so, GNAPs failed to provide any comments on the contract language; instead, Verizon states, GNAPs forwarded Verizon a letter, dated January 14, 2003, purportedly seeking clarification on issues already addressed by the Arbitration Order (Motion at 4). Thereafter, on January 16, 2003, Verizon notes, GNAPs informed the Department that it intended to adopt the Sprint Agreement (id.). GNAPs'

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[2] (…continued)
approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

conduct, argues Verizon, clearly demonstrates a refusal to comply with the Department's Arbitration Order and to fulfill its obligations to engage in good faith negotiations (Motion at 4).

Additionally, Verizon alleges that the sole reason GNAPs seeks to adopt the Sprint Agreement is to avoid the Department's rulings in the Arbitration Order, but, argues Verizon, use of the § 252(i) adoption process for this purpose is improper (id. at 5). Verizon notes that GNAPs has appealed the Arbitration Order to both the Supreme Judicial Court and the United States District Court, and urges the Department not to permit GNAPs' additional collateral attack on the Arbitration Order through adoption of the Sprint Agreement (id.).

Verizon also argues that GNAPs' conduct is inconsistent with its obligations under the Act (Motion at 5). Verizon contends that the Federal Communications Commission ("FCC") made clear that § 252 arbitration decisions are binding and that carriers that refuse to enter an arbitrated agreement may face penalties for violating their obligation to negotiate in good faith (id. at 5-6, citing Local Competition Order[3] at ¶ 1293 and 47 C.F.R. § 51.807(h)).

Verizon notes that the Sprint Agreement was available for adoption by GNAPs at the time it commenced the arbitration, but that GNAPs chose to pursue the alternate course of arbitration (Motion at 6). As a result of GNAPs' choice, Verizon maintains that the Department and Verizon expended substantial resources in connection with the arbitration (id.). Verizon argues that GNAPs' last minute attempt to adopt the Sprint Agreement, as well

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[3] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (August 9, 1996) ("Local Competition Order").

as its refusal to comply with the Arbitration Order, constitute failure to negotiate in good faith (id., citing § 252(b)(5) of the Act[4]).

Verizon further contends that if the Department allows GNAPs to ignore its decision and to adopt the Sprint Agreement, it will establish a precedent that will encourage future "strategic" arbitrations and the waste of the Department's resources, as well as those of Verizon (Motion at 6). Verizon urges the Department not to permit GNAPs to game the process in this way (id.).

Alternatively, Verizon requests through a motion for clarification that if the Department permits GNAPs to adopt another interconnection agreement at this late stage, it should do so only on the condition that the adopted agreement be modified to reflect the Department's legal and policy determinations set forth in the Arbitration Order (Motion at 6). Finally, Verizon asks the Department to order GNAPs to reimburse Verizon for its attorneys' fees and costs incurred in connection with the arbitration proceeding (id.).

In sum, Verizon requests that the Department approve Verizon's contract language as the final binding agreement between the Parties. In the alternative, if the Department permits GNAPs to adopt another agreement, Verizon urges the Department to clarify that the adopted

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[4] Verizon's Motion incorrectly cites to § 252(b)(8), which does not exist. Section 252(b)(5) states that:

> The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

agreement must be modified to be consistent with the Arbitration Order, and also to order that GNAPs reimburse Verizon for its attorneys' fees and costs incurred in connection with the arbitration (Motion at 7).

B. GNAPs

GNAPs contends that the point of Verizon's Motion is that, by arbitrating certain issues with Verizon pursuant to § 252(b) of the Act, GNAPs has waived its right to adopt existing agreements under § 252(i)[5] of the Act (Opposition at 1). This proposition, according to GNAPs, is absurd on the merits because, argues GNAPs, nothing in § 252(i) or any applicable rule or regulation suggests that a competitive local exchange carrier ("CLEC") may not opt into an existing agreement just because it has arbitrated a new one (id.). In fact, GNAPs maintains, the central purpose of § 252(i) is to prevent discrimination against CLECs by allowing any CLEC to operate under the same terms and conditions that apply to any other CLEC (id. at 2). In the present case, because the terms in the Sprint Agreement are more appropriate on the whole than the arbitrated agreement, GNAPs states that it has chosen to adopt the Sprint Agreement, and, GNAPs maintains, it is entitled to do so if it so chooses (id.).

More specifically, GNAPs argues that § 252(i) permits any CLEC to elect to operate under the same terms and conditions contained in any effective interconnection agreement approved by the Department (Opposition at 2). GNAPs further states that applicable FCC

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[5] In its Opposition, GNAPs incorrectly cites to § 251(i) of the Act. Section 251(i), the Savings Provision, states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

rules expand this statutory right in various ways (id., citing 47 C.F.R. § 51.809[6]). Additionally, GNAPs asserts that an adoption of an agreement under § 252(i) takes effect immediately, and is not subject to state review (id., citing In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc., CC Docket No. 99-154, Memorandum Opinion and Order, FCC 99-199 at n.25 (August 3, 1999)). Furthermore, GNAPs maintains that Verizon's contract language in the arbitrated agreement preserves GNAPs' right to immediately substitute the terms of the Sprint Agreement for the terms of the arbitrated agreement (Opposition at 3, citing Motion, Exhibit A, § 46.1[7]). GNAPs therefore

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[6] Section 51.809 requires incumbent LECs to make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to § 252 of the Act, and also prohibits incumbent LECs from limiting the availability of any individual interconnection, service, or network element arrangement, unless the incumbent LEC proves to the state commission that: (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement; or (2) the provision of a particular interconnection, service, or element to the requesting telecommunications carrier is not technically feasible. Section 51.809 further requires that individual interconnection, service, or network element arrangements remain available for use by telecommunications carriers for a reasonable period of time after the approved agreement is available for public inspection under § 252(f) of the Act.

[7] Section 46.1 states that "[t]o the extent required by Applicable Law, each Party shall comply with Section 252(i) of the Act . . ." GNAPs also references § 46.2 of the arbitrated agreement as relevant (see Opposition at 4). Section 46.2 states:

> To the extent that the exercise by GNAPS of any rights it may have under Section 252(i) . . . results in the rearrangement of Services by Verizon, GNAPs shall be solely liable for all costs

(continued…)

argues that Verizon cannot claim that GNAPs would not be entitled to choose to operate under the Sprint Agreement (id.).

Moreover, GNAPs notes that there has been some debate in the past over the extent to which a requesting carrier may pick and choose from among the provisions of a complete agreement, and over the expiration date of an agreement; however, GNAPs maintains, because GNAPs has elected to adopt the Sprint Agreement in its entirety, and because the Sprint Agreement does not expire until July 2004, those debates are irrelevant here (Opposition at 3). GNAPs notes that Verizon has not raised these or any other ground upon which GNAPs' adoption of the Sprint Agreement is inappropriate (id.).

GNAPs also argues that Verizon's reliance on the Local Competition Order is misplaced because the cited material relates to the FCC's development of the rules that apply when the FCC acts as an arbitrator under 47 U.S.C. § 252(e)(5) (Opposition at 5). GNAPs states that, in developing those rules, the FCC rejected the suggestion that an incumbent LEC could walk way from the results of an FCC-conducted arbitration (id.). GNAPs further states that the FCC expressly noted that competing providers do not have an affirmative duty to enter into agreements under § 252 (id., citing Local Competition Order at ¶ 1293). According to GNAPs, the FCC noted that there may be circumstances in which a refusal to enter into an arbitrated agreement constitutes a failure to negotiate in good faith; however, GNAPs insists that there is no possible basis for reaching such a conclusion in the present case (id. at 5-6).

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[7] (…continued)
associated therewith, as well as for any termination charges associated with the termination of existing Verizon Services.

Finally, GNAPs accuses Verizon of wanting to discriminate against GNAPs as compared to the terms in the Sprint Agreement by trying to force GNAPs to operate on terms different from and less favorable than the Sprint Agreement (Opposition at 6). Such discrimination, GNAPs argues, is expressly forbidden under § 252(i) and, GNAPs asserts, any lack of good faith in this matter lies with Verizon (id.).

In sum, GNAPs argues that Verizon is not entitled to force GNAPs to waive its § 252(i) rights and operate under a less favorable agreement than the Sprint Agreement (Opposition at 6). Even if Verizon assumed that the arbitrated agreement is binding, GNAPs alleges that § 46 of that agreement expressly preserves GNAPs' right to adopt another agreement, and Verizon therefore has no right to prevent GNAPs from adopting the Sprint Agreement (id.). GNAPs urges the Department to affirm GNAPs' right under § 252(i) to adopt and operate under the Sprint Agreement for the remainder of that agreement's term (id. at 6-7).

IV. ANALYSIS AND FINDINGS

GNAPs contends that, regardless of the fact that it has arbitrated a new agreement, nothing prevents it from adopting another existing agreement (Opposition at 1). In other words, GNAPs would have us find that competing providers have an unequivocal right under § 252(i) to adopt a more favorable agreement. In effect, under GNAPs' view, § 252(i) grants GNAPs, and any other CLEC, an unconditional right to avoid obligations under a state-arbitrated agreement and to enter into another agreement of its choosing instead. For the reasons discussed below, we determine that such a conclusion is at odds with Department precedent and policy, and with the Act.

First, when the Department renders a decision, that decision has the force of law. Stated differently, the Department's decision resolving the arbitrated issues is final and binding on both the parties to the arbitration. A final arbitration order may not be simply avoided by a party for different or more favorable terms, absent mutual agreement by the parties. In the present case, the Department's Arbitration Order, at 77, directed, in no uncertain terms, that Verizon and GNAPs incorporate the Department's determinations into a final agreement. The Department provided no alternatives to that directive. We find that GNAPs' January 16, 2003 letter, informing the Department of its intent to adopt the Sprint Agreement, fails to meet its obligations under the Arbitration Order. GNAPs' characterization in its January 16, 2002 letter, that the "agreed-upon schedule in this case, (as modified by the Joint Motion for Extension of Time), requires the parties to file a contract governing the terms and conditions of exchanging traffic between them on or before January 17, 2003," grossly mischaracterizes the clear directive in the Arbitration Order to file an agreement consistent with our findings therein. Simply put, GNAPs has failed to comply with the Department's Arbitration Order.[8]

Second, the Department has recognized on numerous occasions that the Act and FCC regulations provide for binding arbitration in the event negotiations cannot be concluded within a specified time, upon petition to the state public utility commission by either party to the

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[8] On December 30, 2002, GNAPs filed, pursuant to § 252(e)(6) of the Act, a complaint with the United States District Court for review of the Department's Arbitration Order. On the same day, GNAPs also filed, pursuant to G.L. c. 25 § 5, an appeal of the Arbitration Order to the Supreme Judicial Court. In both its complaint and appeal, GNAPs alleges that the Arbitration Order violates federal and/or state law. GNAPs did not seek a stay of the Department's Arbitration Order pending its complaint or appeal. Thus, the Arbitration Order remains in effect.

negotiation. See, e.g., Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 86-80/81, 96-83, 96-94 - Phase 1 Order at 1-2 (November 8, 1996); Phase 2 Order at 1-2 (December 3, 1996); Phase 3 Order at 1-2 (December 4, 1996); Phase 4 Order at 1-2 (December 4, 1996). The Department has conducted all arbitrations under § 252 with the full intent that its decisions were binding on both parties. While we agree with GNAPs that the rules set forth in the Local Competition Order apply specifically to situations where the FCC conducts the arbitration, we find the FCC's rules instructive, as well as consistent with our requirement that arbitrations are binding on both parties to the arbitration.

We find that GNAPs misreads the FCC's statement in the Local Competition Order, at ¶ 1293, that "competing carriers do not have an affirmative duty to enter in to agreements under section 252," as somehow granting GNAPs the right to refuse to enter into an arbitrated agreement so long as such refusal does not constitute a failure to negotiate in good faith (see Opposition at 5-6).[9] The Department disagrees with GNAPs' interpretation. The more appropriate reading is that § 252 of the Act affords competing carriers the choice between purchasing services through an incumbent's tariff, negotiating an agreement, or arbitrating an agreement with the incumbent. On the other hand, incumbent LECs may not force a CLEC to purchase from its tariff, but must enter into an interconnection agreement if the CLEC requests to do so, either by negotiating or arbitration. This reading is more consistent with the Act and

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[9] The FCC stated that "[w]e also believe that, although competing providers do not have an affirmative duty to enter into agreements under 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith." Local Competition Order at ¶ 1293.

FCC's rules. GNAPs' interpretation would allow a carrier to choose arbitration over negotiation, and then adopt another carrier's negotiated agreement if it does not like the results of the arbitration that its own choice triggered.

Even assuming that § 252 does not impose on CLECs an affirmative duty to enter into agreements, the FCC has clearly imposed such an obligation when the FCC conducts an arbitration proceeding. Specifically, 47 C.F.R. § 51.807(h) states that "[a]bsent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties." As noted above, the Department imposes a similar obligation when it conducts arbitrations pursuant to the Act. In fact, the FCC recognized a state's right to impose such an obligation. More precisely, the FCC stated that its rules may "offer guidance the states may, at their discretion, wish to consider in implementing their own mediation and arbitration standards." Local Competition Order at ¶ 1283.[10] Consistent with FCC rules, the Department has since it began arbitrating contracts in 1996 and continues to require that its decisions reached through arbitration are binding on the parties.

Additionally, we find GNAPs' interpretation of § 46.1 of the arbitrated agreement to be incorrect. GNAPs would have us conclude that it has the right to void an existing binding contract and enter into a new, and more favorable contract, at any point. Such a conclusion is

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[10] Regardless of what the FCC rules state for FCC-conducted arbitrations, we note that the FCC rules are not binding on the Department. It is the Department's own arbitration standards, which have been applied consistently since the passage of the Act, that are relevant here.

at odds with the definition of a contract. A contract binds both parties -- a contract that permits one party absolute discretion to void the contract and to enter into another contract of its choosing is no contract at all. Under GNAPs' interpretation of § 252(i) of the Act and § 46.1 of the arbitrated agreement, nothing prevents GNAPs from voiding and adopting a more favorable contract, and from doing so repeatedly as soon as it discovers a more favorable agreement to adopt. Such a result is inconsistent with the Act's requirement that carriers negotiate in good faith. Accordingly, we find GNAPs' argument to be without merit.

Similarly, we are not convinced by GNAPs' claim that the purpose of § 252(i) -- to prevent discrimination against CLECs by allowing any CLEC to operate under the same terms and conditions that apply to any other CLEC -- somehow entitles GNAPs to adopt the Sprint Agreement in lieu of finalizing the arbitrated agreement. The § 252(i) adoption process permits a CLEC, during the negotiation process, to adopt another carrier's contract, not to do so after a decision has been reached through arbitration. The § 252(i) adoption process also allows a CLEC to avoid the costs and delay associated with negotiating its own contract. In the present case, we find that GNAPs' invocation of the § 252(i) adoption process is merely an attempt to avoid the Department's rulings in the Arbitration Order, and we agree with Verizon that such use is improper. The § 252(i) adoption process is not a loophole to evade the effectiveness of an arbitrated decision. Accordingly, we reject GNAPs' attempted adoption of the Sprint Agreement as somehow satisfying its obligations under our Arbitration Order.

We are also unpersuaded by GNAPs' claim of discrimination. Once again, we reiterate that the decision reached through arbitration is binding and the directives contained in the

Arbitration Order are clear and enforceable. As such, we will not accept GNAPs' attempt to adopt the Sprint Agreement as compliance.

Third, public policy reasons exist which dictate that decisions reached through arbitration are binding on both parties. To begin, permitting either party to an arbitration the ability to ignore our final decision undermines the arbitration process. We agree with Verizon that if GNAPs is permitted to ignore the Arbitration Order, it would establish precedent that encourages "strategic" arbitrations and permits carriers to game the system. For instance, without binding arbitrations, a carrier would have no incentive to negotiate in good faith as required by § 252(b)(5) because, if the carrier does not obtain the terms it desires through negotiations, the carrier could arbitrate for its desired result. If the desired result is not achieved through arbitration, the carrier can simply adopt another carrier's agreement that is more consistent with its desired result and, thus, be no worse off than at the beginning of the arbitration process. We will not permit such a result. Finally, the Department invests significant time, effort, and resources to arbitrate and render arbitration decisions. Permitting GNAPs to adopt another agreement in lieu of the decision reached through arbitration would result in a waste of the Department's limited resources, as well as an unnecessary burden on Verizon. That result is contrary to the public interest.

As noted above, we find that GNAPs' proffer of the Sprint Agreement fails to comply with our directives. As Verizon points out, the Sprint Agreement was available to GNAPs for adoption before GNAPs filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order, GNAPs could have chosen to adopt the Sprint Agreement. But,

once our final Arbitration Order was issued, the adoption process under § 252(i) was not a lawful option in order to comply with the arbitrated decision. Verizon, on the other hand, has complied with our directive to incorporate our determinations into a final agreement. See Motion, Exhibit A. We have reviewed the agreement submitted by Verizon and find that it complies with our directives in the Arbitration Order. Accordingly, we grant Verizon's Motion and hereby approve the final arbitration agreement.[11] We direct the parties to sign the approved arbitration agreement and to submit a copy to the Department within seven (7) days of this Order.

In conclusion, we remind the Parties that § 252(b)(5) of the Act provides that:

> The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

We caution GNAPs that GNAPs' failure to sign the Department-approved arbitration agreement, as directed herein, will be deemed a refusal to cooperate with the Department in carrying out its function as arbitrator, and thus, shall be considered a failure to negotiate in good faith, as well as a violation of a lawfully-entered Department order. See G.L. c. 159, §§ 39, 40.

V. ORDER

After due consideration, it is

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[11] Because we grant Verizon's Motion for approval of the final arbitration agreement, we do not reach the merits of Verizon's request, in the alternative, for clarification.

ORDERED: That the issues under consideration in this Order be determined as set forth in this Order; and it is

FURTHER ORDERED: That Verizon's Motion for Approval of Final Arbitration Agreement or, in the Alternative, For Clarification, is granted; and it is

FURTHER ORDERED: That the Final Arbitration Agreement submitted to the Department as Exhibit A in Verizon's Motion is hereby approved;

FURTHER ORDERED: That the Parties sign and submit a copy of the executed Final Arbitration Agreement to the Department within seven (7) days of the date herein.

By Order of the Department,

_____/s/_____
Paul B. Vasington, Chairman

____/s/_____
James Connelly, Commissioner

___/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner